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Nos. 79-327 and 79-354

In the Supreme Court of the United States

OCTOBER TERM, 1979

CBS INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

COLUMBIA PICTURES INDUSTRIES, INC., ET AL,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The memorandum opinion of the court of appeals (CBS Pet. App. A18-A25; CPI Pet. App. 76a-82a)[1] is not yet reported. The memorandum opinion (CBS Pet. App. A9-A17) and order (CPI Pet. App. 37a) of the district court are unreported.

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[1]"CBS Pet. App." refers to the appendix to the petition in No. 79-327; "CPI Pet. App." refers to the appendix to the petition in No. 79-354.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1979. The petition in No. 79-327 was filed on August 28, 1979; the petition in No. 79-354 was filed on September 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' motions to intervene in the consent-decree proceedings of a civil antitrust suit brought by the United States were properly denied.

STATEMENT

On December 10, 1974, the United States filed a complaint charging that the National Broadcasting Company, Inc. ("NBC") had combined with its affiliated stations to use its control over access to network air time to restrain and monopolize prime-time television entertainment programming exhibited on that network, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2 (CPI Pet. App. 8a-17a). Substantially identical complaints were filed simultaneously against the other two commercial television networks. *United States* v. *CBS Inc.*, No. 74-3599-RJK (C. D. Cal.); *United States* v. *American Broadcasting Cos.*, No. 74-3600-RJK Cal.).[2]

[2]Similar complaints had been filed against the three networks in April 1972. They were dismissed without prejudice in November 1974. *United States* v. *National Broadcasting Co.*, 65 F.R.D. 415 (C.D. Cal. 1974), appeal dismissed for want of jurisdiction, 421 U.S. 940 (1975). The networks alleged that the suits had been instituted for impermissible purposes. Although the government denied these allegations, the court, after the government was unable to comply with certain discovery demands, determined that dismissal without prejudice and filing new complaints during a new administration would be the most expeditious means of dispelling the allegations.

On November 17, 1976, the United States and NBC filed a proposed final judgment. In essence, it enjoins NBC from obtaining any interest in television entertainment programming produced by others, except for the right to network exhibition (CPI Pet. App. 21a-22a), and limits for ten years the amount of programming NBC may produce for use on its network (CPI Pet. App. 22a-23a).[3] Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. 16(b)-(h), the proposed judgment, a competitive impact statement, written comments by interested members of the public, and responses by the United States were appropriately filed and published. 42 Fed. Reg. 24996-25312 (1977). Petitioners filed lengthy comments criticizing the decree, CBS claiming that it went too far, CPI asserting that it did not go far enough. *Id.* at 25126-25153, 25170-25253. Both the government and the district court considered these comments. *Id.* at 25160-25167, 25254-25266; CPI Pet. App. 51a-61a.

In response to the various comments, the United States and NBC filed a stipulation on May 12, 1977, amending the proposed judgment.[4] The stipulation also preserved litigating rights on subject matter not treated in the proposed jugdment. 42 Fed. Reg. 24997 (1977).

[3]It does not limit the amount of programming NBC may produce for sale to other networks (CPI Pet. App. 44a, 46a).

[4]One significant change was the deletion of a pay-cable-exclusivity section, which was opposed by pay cable and other interests. Although the United States intended that section to operate as a limit on the exclusivity terms that NBC could obtain, many of those who commented felt that it would put the government's imprimatur on activity considered abusive. The comments convinced the government that the section would not provide desirable relief, and the section was deleted. 42 Fed. Reg. 25112-25114 (1977).

On April 20, 1977, before the United States had filed the amended proposed final judgment or its responses to public comment, petitioner CBS Inc. ("CBS") moved to intervene in the government's action against NBC. The district court denied the motion. It noted that CBS lacked any specific interest and that there was no showing that the decree would directly and adversely affect CBS (CBS Pet. App. A14-A15). Moreover, the court observed that CBS could protect its position by action in its own suit because certain provisions of the consent judgment are not effective unless similar relief is granted in the CBS and ABC litigation (CBS Pet. App. A15-A16). Thus, although CBS had filed comments and could participate informally, intervention was not warranted.

On June 17, 1977, petitioner Columbia Pictures Industries, Inc., *et al.* ("CPI") also moved to intervene in the district court proceedings (CPI Pet. 7). By minute order dated November 30, 1977, the district court denied CPI's motion (CPI Pet. App. 37a).

Meanwhile, the district court, relying on the voluminous record of comments and oral argument, entered the proposed judgment on November 28, 1977 (CPI Pet. App. 18a). It filed an opinion regarding the consent judgment on January 26, 1978 (CPI Pet. App. 38a-74a).[5]

The court of appeals affirmed the district court's denial of the motions to intervene (CBS Pet. App. A25). The court held that denial of intervention of right

[5]After the entry of judgment, but before the district court filed its opinion, CBS sought a writ of mandamus to require that the consent judgment be vacated. The court of appeals denied the petition without opinion, and CBS unsuccessfully sought review by this Court. *CBS Inc.* v. *United States District Court*, No. 77-3975 (9th Cir. Apr. 12, 1978), cert. denied, No. 78-1685 (Oct. 1, 1979).

pursuant to Rule 24(a)(2), Fed. R. Civ. P., was appropriate in this case because petitioners' interests were adequately represented by the government (CBS Pet. App. A22-A23). The court of appeals further held (*id.* at A23-A24) that the district court did not abuse its discretion when it denied permissive intervention under Rule 24(b)(2) in light of (1) the district court's consideration of petitioners' contentions as presented in their lengthy written comments, (2) the prospect of undue delay or prejudice to the adjudication of the rights of the government and NBC, and (3) the court's leaving open the possibility of further participation by CBS and CPI in the consideration of the decree, if appropriate, in the absence of intervention.[6]

ARGUMENT

The decision of the court of appeals is correct and consistent with the decisions of this and other courts. It does not merit further review.

1. The courts below properly concluded that petitioners were not entitled to intervene of right pursuant to Rule 24(a)(2). Intervention by right under Rule 24(a)(2) is available only where "the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." CBS's interest as a buyer and "in preserving competition among program suppliers" (CBS Pet. 14), and CPI's interest as a seller are no different from the general public interest in effective competition in this market. This public interest

[6]On November 7, 1977, after its motion to intervene had been denied, CBS moved for an evidentiary hearing on the proposed consent judgment (CBS Pet. in No. 78-1685 at 8).

in competition is, of course, important. Nevertheless, Congress has vested in the United States—not private parties—the representation of the public interest. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Cal. 1967), aff'd per curiam *sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968). Thus, in federal antitrust litigation it is the United States "which must alone speak for the public interest." *Buckeye Coal & Ry.* v. *Hocking Valley Ry.*, 269 U.S. 42, 49 (1925); *United States* v. *Borden Co.*, 347 U.S. 514, 518 (1954).

Courts have regularly denied intervention to third parties, whether competitors, customers, or interested citizens, who have sought to intervene on the basis of their disagreement with the government's assessment of what could enhance competition. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 689 (1961); *United States* v. *Associated Milk Producers, Inc.*, 534 F. 2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *Blue Chip Stamp Co.*, *supra*, 272 F. Supp. at 438-439; *United States* v. *CIBA Corp.*, 50 F.R.D. 507 (S.D.N.Y. 1970). Such is the case here, and, therefore, the court of appeals correctly concluded that the government adequately represented that interest (CBS Pet. App. A22-A23). *United States* v. *Hartford-Empire Co.*, 573 F. 2d 1 (6th Cir. 1978).[7]

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[7]Indeed, petitioners have not only failed to demonstrate the necessary interest and inadequate representation, but they have also failed to show that disposition of the action without intervention would impose a practical impairment on their interests. The NBC consent judgment does not preclude CPI from bargaining for better terms when it negotiates program licensing with NBC. CBS may protect its litigating position in the government's separate suit against it. CBS Pet. App. A15-A16; *United States* v. *Associated Milk Producers, Inc.*, *supra*, 534 F. 2d at 116 n.3.

Contrary to petitioners' assertions (CBS Pet. 14, 15, 22; CPI Pet. 10-12), *Cascade Natural Gas Co.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), does not mandate intervention here. The Court there allowed intervention of right in a government antitrust suit on remand, but it did so only because it found that the United States had "knuckled under" to El Paso and for three years had failed to carry out the Court's mandate of "divestiture without delay." *Id.* at 136. Consequently, *Cascade* has been interpreted as allowing intervention only to insure compliance with an earlier mandate. *United States* v. *Blue Chip Stamp Co.*, *supra*, 272 F. Supp. at 438; *United States* v. *Western Electric Co.*, 1968 Trade Cases para. 72,415 (D.N.J. 1968), aff'd per curiam *sub nom. Clark Walter & Sons* v. *United States*, 392 U.S. 659 (1968); *United States* v. *Automobile Manufacturers Ass'n*, 307 F. Supp. 617 (C.D. Cal. 1969), aff'd per curiam *sub nom. City of New York* v. *United States*, 397 U.S. 248 (1970); *United States* v. *Paramount Pictures*, 333 F. Supp. 1100 (S.D.N.Y.), aff'd mem. *sub nom. Syufy Enterprises* v. *United States*, 404 U.S. 802 (1971). In the present case, there is no issue of compliance with the mandate of a court.[8]

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[8]Contrary to CBS's submission (CBS Pet. 17, 20), the decision of the court of appeals does not conflict with this Court's opinion in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972). That case involved a union member who sought to intervene in a suit brought by the Secretary of Labor pursuant to Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 482(b). That Act, unlike the antitrust laws, does not create an independent, private right of action and, as a consequence, intervention has been granted more freely. Note, *Intervention in Government Enforcement Actions*, 89 Harv. L. Rev. 1174, 1178 & n.13 (1976).

Nor is this a case where it can be claimed that the government "knuckled under" to the defendant in settling the case. To the contrary, the consent decree is entirely consistent with the position taken by the United States throughout the litigation (CPI Pet. App. 73a).

2. The court of appeals correctly rejected (CBS Pet. App. A23-A24) CBS's argument (CBS Pet. 23-26) that the district court abused its discretion when it denied permissive intervention.[9] The district court gave all persons a chance to present their views on the merits of the decree; petitoners did so at length. 42 Fed. Reg. 25126-25153, 25170-25253 (1977). It was well within the district court's discretion not to hold an evidentiary hering. No statute requires one, and the comments submitted pursuant to the APPA provided an adequate factual basis for the court's consideration of the decree. The court carefully considered the merits of the proposed decree and found that, although it displeased some persons by not going far enough and others by going too far, it was designed to address the competitive disadvantage caused by NBC's "enormous market power" (CPI Pet. App. 73a). In these circumstances, it was no abuse of discretion to deny permissive intervention. *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142 (1944). Moreover, since NBC and the government were about to settle their case, the result of intervention by a party hostile to the decree would most likely be delay. See, *e.g.*, *United States* v. *CIBA Corp.*,

[9]Fed. R. Civ. P. 24(b)(2) provides that

> Upon timely application anyone may be permitted to intervene in an action * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

supra, 50 F.R.D. at 514. Undue delay is reason enough for denial of permissive intervention under the express language of Rule 24(b)(2) (see note 9, *supra*).

3. Finally, the legislative history of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h) ("APPA") does not reflect congressional opposition to settlements in antitrust cases or an intent to broaden the existing right of intervention in consent-decree proceedings. Congress recognized that consent decrees are a "particularly valuable enforcement tool." 119 Cong. Rec. 3451 (1973) (Sen. Tunney); *United States* v. *Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). Thus, it had no intention of discouraging such settlements.

Moreover, while Congress intended a district judge to determine whether the entry of a consent judgment is in the public interest, this determination can be made based on information produced pursuant to the APPA. The provisions for public participation in the consent decree process set forth in the APPA insure that the public will have a fair chance to comment on proposed decrees and that the district court will have the benefit of that comment. Congress expected that the district court would "adduce the necessary information through the least complicated and least time-consuming means possible." S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974); 120 Cong. Rec. 36344 (1974). Intervention, though permissive under the APPA, 15 U.S.C. 16(f)(3), is not necessary to produce information which the APPA itself generates as part of the consent decree process. For this reason, the APPA was not intended by Congress to expand the right

to intervene (119 Cong. Rec. 24599 (1973) (Sen. Tunney)) and the courts have consistently denied intervention in consent-decree proceedings under circumstances similar to this case. *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 41-44 (W.D. Mo. 1975), aff'd, 534 F. 2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *Hartford-Empire Co., supra.*[10]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[10]Contrary to petitioners' argument (CBS Pet. 12; CPI Pet. 10), Congress certainly did not intend that persons who would not otherwise qualify for intervention, should nonetheless be allowed to intervene so that they could take their dissatisfaction with consent judgments to federal appellate courts.

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